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----- X
Plaintiff,

KELLY CHESLER

vs.

Defendants,

CITY OF JERSEY CITY; CITY OF JERSEY
COUNCIL; CITY OF JERSEY CITY
BUSINESS ADMINISTRATOR, MARK
BUNBURY, (in his official capacity) CHIEF
OF POLICE MICHAEL KELLY (in his official
capacity) ; MAYOR STEVEN M. FULOP, (in
his official capacity)
----- X

SUPERIOR COURT OF NEW JERSEY
LAW
DIVISION: HUDSON COUNTY

Docket No. HUD-L-4722-18

**NOTICE OF MOTION TO DISMISS
THE COMPLAINT IN LIEU OF
PREROGATIVE WRIT PURSUANT
TO RULE 4:6-2(E)**

TO: All Counsel of Record

PLEASE TAKE NOTICE that on **Friday, February 15, 2019, at 9:00 a.m.** in the forenoon or as soon thereafter as counsel may be heard, the undersigned, attorneys for Defendants City of Jersey City, City of Jersey Council, City of Jersey City Business Administrator Mark Bunbury, Chief of Police Michael Kelly, and Mayor Steven M. Fulop shall apply before the Superior Court of New Jersey, Hudson County, for an Order dismissing the Complaint in Lieu of Prerogative Writ for failure to state a claim pursuant to R. 4:6-2(e); and


PLEASE TAKE FURTHER NOTICE that, in support of the within motion, Defendants City of Jersey City, City of Jersey Council, City of Jersey City Business Administrator Mark Bunbury, Chief of Police Michael Kelly, and Mayor Steven M. Fulop will rely on the enclosed Memorandum of Law and Certification of Benjamin A. Levine with attached exhibits, submitted herewith; and

PLEASE TAKE FURTHER NOTICE that, pursuant to R. 1:6-2(a), this Motion shall be deemed uncontested unless responsive papers are timely filed and served stating with particularity the basis of the opposition to the relief sought, and absent the filing of opposition papers, it is requested that this Motion be decided on the papers. Oral argument is requested if opposition is submitted.

PLEASE TAKE FURTHER NOTICE that, no discovery end date has been assigned in this matter.

Dated: January 28, 2019

GORDON REES SCULLY MANSUKHANI, LLP
*Attorneys for Defendants City of Jersey City, City of
Jersey City Council, City of Jersey City Business
Administrator, Mark Bunbury, Chief of Police
Michael Kelly, and Mayor Steven M. Fulop*

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POLICE MICHAEL KELLY (in his official
capacity); MAYOR STEVEN M. FULOP, (in
his official capacity)

SUPERIOR COURT OF NEW
JERSEY LAW DIVISION: HUDSON
COUNTY

Docket No. HUD-L-4722-18

**BRIEF OF DEFENDANTS IN SUPPORT OF THEIR MOTION TO DISMISS THE
COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN
BE GRANTED PURSUANT TO RULE 4:6-2(E)**

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PRELIMINARY STATEMENT

Plaintiff, Kelly Chesler's ("Plaintiff" or "Chesler"), Complaint in Lieu of Prerogative Writ must be dismissed as she has failed to exhaust her administrative remedies under *Rule 4:69-5* and therefore this matter is not ripe for adjudication in the Superior Court.

Chesler is a lieutenant with the City of Jersey City Police Department ("JCPD"). On June 14, 2016, Lieutenant Chesler and Officers Michael O'Neill, Joseph Ascolese and Michael Maietti of the JCPD were collectively indicted on one-hundred seven (107) counts of conspiracy, falsifying records and official misconduct. Chesler was formally charged with twenty (20) counts consisting of Conspiracy to Commit Theft by Deception, Theft by Deception, Falsifying Records, Official Misconduct and Pattern of Official Misconduct. Following dismissal of the indictment on October 23, 2018, the Hudson County Prosecutor's Office referred the matter back to the JCPD's Internal Affairs Unit ("Internal Affairs") for administrative review and action.

Immediately following the dismissal of criminal charges, on October 24, 2018, the JCPD reinstated Chesler. Simultaneously, counsel for Chesler made a demand upon the City of Jersey City ("City") for reinstatement, back pay and reimbursement for all legal fees and costs associated with her defense of the criminal matter. On October 31, 2018, Scott W. Carbone, Assistant Corporation Counsel for the City, responded to Chesler's counsel that the City was reviewing Chesler's claims under both *N.J.S.A. 40A:14-149.2* (back pay and benefits during suspension period) and *N.J.S.A. 40A:14-155* (counsel fees and costs associated with the criminal trial) and requested Chesler's mitigation documents for the time period of her suspension. On November 7, 2018, counsel for Chesler responded with the mitigation documents, but failed to provide the sum of defense costs sought. On November 29, 2018, Plaintiff filed her Complaint in Lieu of Prerogative Writ.

Currently, this matter remains under investigation by the City as it evaluates and supplements its record of accusations against Lieutenant Chesler and alleged misconduct following the conclusion of the criminal matter. The interview of a key witness has taken place on January 16, 2019. Chesler and Officer O'Neill are the remaining two (2) individuals left to be interviewed. Officer O'Neill's interview is scheduled for February 1, 2019 and Chesler's is scheduled for February 6, 2019. As indicated in the affidavit of investigating officer Robert Sjosward, there has been no unreasonable delay in the JCPD's Internal Affairs Unit's investigation of this matter since it was referred by the Hudson County Prosecutor's Office for administrative review and action. Thus, Plaintiff has brought this action prematurely and accordingly, it must be dismissed. Prerogative writs are appropriate for parties seeking review, hearing and relief by the Superior Court when a municipal agency has acted. Because the City has not made a final determination regarding an award of back pay or counsel fees, there is nothing for this court to review.

Once investigation of the matter is complete, should Plaintiff disagree with the City's determination, the Civil Service Commission ("Commission") will have primary jurisdiction of this matter and become Plaintiff's proper avenue to seek recourse. On her appeal before the Commission, Plaintiff will have an opportunity to assert any statutory or regulatory violations as defenses against the City. Only after a final determination by the Commission can Plaintiff bring allegations against the City by way of a complaint in lieu of prerogative writ absent an exception to the rule. Thus, the instant complaint is premature.

As discussed in further detail below, it is the clear intent of the Legislature to vest jurisdiction over civil service issues administratively with the Commission, and absent a compelling excuse as to why Plaintiff's exercise of her administrative remedies would be futile, Plaintiff must pursue relief as established by court rule and as a matter of public policy. The

preservation of the integrity of the Legislature's intent mandates that Chesler's complaint be dismissed. In sum, Plaintiff has utterly failed to plead what administrative action she seeks relief from as there has been no administrative action taken in this matter. For the reasons set forth herein, the instant action cannot be maintained as there exists an available right of review before an administrative agency which has not been exhausted.

STATEMENT OF FACTS

Plaintiff is a police officer with the JCPD. (*See*, Complaint in Lieu of Prerogative Writ ("Complaint") at ¶ 1, Exhibit ("Exh.") A to the Certification of Benjamin A. Levine ("Levine Cert.")).

On June 14, 2016, Plaintiff was indicted by a grand jury (Indictment No. 16-06-0838) with charges of Theft by Deception, Official Misconduct, Pattern of Official Misconduct, Falsifying Records, and Conspiracy. (*See*, Exh. A at ¶¶ 9 and 10). Officers Michael O'Neill, Joseph Ascolese, and Michael Maietti were also charged with criminal conduct. (*See, Id.*).

Trial commenced against Plaintiff on September 5, 2018, presided over by the Honorable Mirtha Ospina, J.S.C. (*See, Id.* at ¶ 14). On October 23, 2018, the criminal charges against Plaintiff were dismissed. (*See, Id.*).

On October 24, 2018, Plaintiff sent a demand to the City Clerk, Robert Byrne, requesting reinstatement, full back pay and benefits and attorneys' fees related to the defense of Plaintiff in the criminal matter. (*See*, Exh. F to the Complaint).

On October 26, 2018, the Office of the Hudson County Prosecutor referred the matter back to the Internal Affairs Unit of the JCPD for administrative review and action. (*See*, Exh. C to Levine Cert.).

As of the filing date of the instant motion, the matter remains under administrative review and a decision has not yet been made as to Plaintiff's back pay and counsel fee claims. (*See*, Exh. B to Levine Cert.).

On October 31, 2018, the City responded to Plaintiff's demand letter requesting mitigation information for the calculation of back pay damages and any other information or materials that Plaintiff's counsel wanted the City to review regarding this claim under *N.J.S.A.* 40A:14-149.2. (*See*, Exh. D to Levine Cert.). The City also requested, "time to complete [their] review of the issues presented" with regard to Plaintiff's claim for attorneys' fees under *N.J.S.A.* 40A:14-155. (*See, Id.*).

On November 7, 2018, Plaintiff's counsel provided the City with the requested information pertaining to back pay damages, but failed to provide the sum of attorneys' fees being sought for the defense of Plaintiff's criminal action. (*See*, Exh. G to Complaint).

On November 29, 2018, Plaintiff filed a Complaint in Lieu of Prerogative Writ with the Superior Court of New Jersey, Law Division, Hudson County, Docket No. HUD-L-4722-18 seeking reinstatement, back pay and attorneys' fees for the defense of Plaintiff in the criminal matter pursuant to *N.J.S.A.* 40A:14-155 and *N.J.S.A.* 40A:14-149.2 (*See*, Exh. A to Levine Cert.).

LEGAL ARGUMENT

I. STANDARD FOR DISMISSAL PURSUANT TO R. 4:6-2

A motion to dismiss for failure to state a claim pursuant to Rule 4:6-2 (e) is based upon the allegations in the pleadings. *See, Rieder v. State Dep't of Transp.*, 221 *N.J. Super.* 547 (App. Div. 1987). In reviewing a motion to dismiss under this section, the court examines whether the pleading has sufficiently set forth a legal cause of action. *See, Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 *N.J.* 739, 746 (1989). If the pleading states no basis for relief, and discovery would not provide one, dismissal of the pleading is appropriate. *See, Energy Rec. v. Dep't of Env. Prot.*, 320 *N.J. Super.* 59, 64 (App. Div. 1999), *aff'd*, 170 *N.J.* 246 (2001) (dismissing claims finding that there was no legal basis entitling relief). *See also, Sickles v. Cabot Corp.*, 379 *N.J. Super.* 100, 105-06 (App. Div.), *certif. denied*, 185 *N.J.* 297 (2005) (granting motion to dismiss as defendants did not have a valid cause of action).

In resolving the motion to dismiss under *Rule* 4:6-2 (e), the Court will consider the allegations pleaded in the Complaint. *See, R. 4:6-2*. However, a motion to dismiss under *Rule* 4:6-2 (e) will not be converted to one for summary judgment by filing with the Court a document referred to in the pleading. *See, NJ Sports v. Bostick Promotions*, 405 *N.J. Super.* 173, 178 (Ch. Div. 2007). A document integral to or explicitly relied upon in the [pleading] may be considered without converting the motion [to dismiss] into one for summary judgment.” *In re Burlington Coat Factory Sec. Litig.*, 114 *F.3d* 1140, 1426 (3d Cir. 1997)); *See also, Banco Popular N. Am. v. Gandi*, 184 *N.J.* 161, 183 (2005) (noting that when “evaluating motions to dismiss, courts consider ‘allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of the claim’” (internal citation omitted)); *See also, New Jersey Citizen Action, Inc. v. County of Bergen*, 391 *N.J. Super.* 596, 605 (App. Div. 2007) (holding that the consideration of certain documents referred to in the complaint did not convert defendants’ *R. 4:6-2(e)* motion into a motion for summary judgment).

Here, the Court should properly consider the documents reflecting the procedural history of this matter attached to the Certification of Benjamin A. Levine as these documents are a matter of public record and involve other documents which are not subject to reasonable dispute. Applying this standard, each of Plaintiff’s claims fail as a matter of law. Plaintiff has not, and cannot, allege facts to sustain the pleaded causes of action against the Defendants.

II. PLAINTIFF’S CLAIMS ARE BARRED BECAUSE SHE HAS FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES

Plaintiff’s Complaint in Lieu of Prerogative Writ must be dismissed as it is not ripe for adjudication by this court under *R. 4:69-5*. Pursuant to *R. 4:69-5*, all administrative remedies must be exhausted prior to adjudication of an action in lieu of prerogative writs. *Theodore v. Dover Bd. of Educ.*, 183 *N.J. Super.* 407, 412 (App. Div. 1982). *R. 4:69-5* provides:

Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right to review before an administrative agency which has not been exhausted.

It is well established that the doctrine of exhaustion of administrative remedies serves three (3) fundamental goals: “(1) the rule ensures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate the need for unnecessary adjudication.” *Borough of Seaside Park v. Comm’r of N.J. Dep’t of Educ.*, 432 N.J. Super. 167, 203 (Super. Ct. App. Div. 2013); *See also, Bd. of Educ. v. Bernards Twp. Educ. Asso.*, 79 N.J. 311, 317 (1979). The principle of administrative review requires pursuit of available procedures, “to their appropriate conclusion and, correlatively, awaiting their final outcome before seeking judicial intervention” *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 767 (1947).

Absent a compelling exception to the rule, all administrative remedies must be exhausted prior to adjudication in superior court. “Exceptions are made when the administrative remedies would be futile, when irreparable harm would result, when jurisdiction of the agency is doubtful, or when an overriding public interest calls for a prompt judicial decision.” *N.J. Civil Serv. Ass’n v. State*, 88 N.J. 605, 613, 443 A.2d 1070 (1982). In determining whether a “manifest injustice” would occur in requiring a plaintiff pursue her rights administratively and bypass the remedies set forth by the Legislature, courts have considered the, “relative delay and expense, the necessity for taking evidence and making factual determinations thereon, the nature of the agency and the extent of judgment, discretion, and expertise involved.” *Roadway Express v. Kingsley*, 37 N.J. 136, 141, 179 A.2d 729 (1962).

Chesler is a lieutenant for the JCPD and a public service employee. The City is a civil

service municipality subject to the *Civil Service Act*, N.J.S.A. 11A:1-1 to 12-6 and Chesler is a classified civil service employee. To this end, the Attorney General's Office promulgated Internal Affairs Policy & Procedures to assist law enforcement agencies conducting internal affairs investigations under the general supervision of the Attorney General. (*See*, Exh. F to Levine Cert.). As such, the proper administrative procedure involves the issuance of a determination of Plaintiff's claims by the JCPD and, should Plaintiff disagree with the determination, following an opportunity for a full and fair hearing, the Commission would have jurisdiction over this matter as the dispute involves civil service issues. *See*, N.J.S.A. 11A:2-6(a) (the commission shall, "after a hearing, render the final administrative decision on appeals concerning permanent career service employees.").

It is well established that it is within the Commission's jurisdiction to hear appeals of disciplined civil service employees setting forth claims for back pay and counsel fees. The plaintiff in *Telesnick v. Newark*, 63 N.J. 221, 223-224 (1973), was a city employee who brought a civil action in the law division for back pay following the dismissal of his indictment of a criminal charge. The city argued that the institution of a civil case was improper because plaintiff's claims were subject to the civil service law and administrative review for mitigation or denial of the claim for back pay. The Supreme Court agreed with the city and remanded the matter to the proper municipal department for an administrative hearing. *See also*, *Mastrobattista v. Essex Cty. Park Comm'n*, 46 N.J. 138, 150 (1965) (holding that back pay claims should be pursued administratively as opposed to through an institution of a civil action in the law division. Additionally, holding that an administrative agency has the power to mitigate and deny back pay when necessary).

Numerous other courts have dismissed matters wherein a litigant attempted to sidestep the statutory administrative requirements promulgated by the Legislature and file a complaint in lieu

of prerogative writ without first exhausting administrative remedies. *See, Roadway*, 37 U.S. at 142 (affirming dismissal of an action brought by a complaint in lieu of prerogative writs to contest a tax lien on the grounds of plaintiff's failure to exhaust administrative remedies); *See also, Smith v. City of Bridgeton*, No. A-1453-16T3, 2018 LEXIS 2607 (N.J. Super. Nov. 28, 2018) (affirming dismissal of police officer-plaintiff's complaint seeking reinstatement, back pay and reimbursement of legal expenses incurred in defending the criminal charge following his acquittal for failure to exhaust administrative remedies). Moreover, in *Fletcher v. City of Newark*, 155, N.J. 5, 10, 382 A.2d 79 (App. Div. 1978), the Appellate Division vacated the lower court's decision and remanded to the administrative agency citing lack of jurisdiction in a case involving a plaintiff-police officer seeking back pay following his reinstatement. The court held, "administrative review of the decision may then be taken in accordance with established procedure. Issues which then remain a matter of dispute may be appealed to us as of right." *Id.*

Here, the analysis stops short of the necessity of evaluating the Commission's jurisdiction and primary responsibility to render fair and final decisions on the claims of back pay and reimbursement of counsel fees because the JCPD has not even completed its initial investigation, held a hearing or rendered a decision. Following the dismissal of the criminal charges against Chesler and referral of the matter to the JCPD, Internal Affairs initiated an administrative investigation into Chesler's alleged misconduct and claims. (*See*, Exh. B to the Levine Cert. at ¶¶ 7 and 12). Interviews were promptly scheduled and continue as of the date of the filing of the instant motion. (*See, Id.* at ¶ 9-11.). Moreover, Investigating Lieutenant Sjosward and Captain George Rotondo anticipate a final report within the next 45 days. (*See, Id.* at ¶ 13.). As disciplinary charges may result from these investigations, no decision on back pay and counsel fees has been made.

Although the criminal charges against Plaintiff were dismissed, administrative actions are civil in nature and do not carry the same constitutional burdens as those imposed in criminal matters. *See, Sabia v. Elizabeth*, 132 N.J. Super. 6, 12, 331 A.2d 620 (App. Div. 1974), holding, “where the conduct of a public employee which forms the basis of disciplinary proceedings may also constitute a violation of the criminal law, however, the absence of a conviction, whether by reason of nonprosecution or even acquittal, bars neither prosecution nor finding of guilt for misconduct in office in the disciplinary proceedings.” Rather, in its investigation and determination, the JCPD must ensure that all proceedings are conducted with fundamental fairness and that procedural safeguards are maintained. *Id.* at 8; *see also, Kelly v. Sterr*, 62 N.J. 105, 107 (1973) (holding, “as long as principles of basic fairness are observed and adequate procedural protections afforded, the requirements of administrative due process have been met.”).

Notably, there exists no irreparable harm or prejudice to Plaintiff as she has been reinstated into her former position since October, and is therefore not accruing any additional alleged damages pending the outcome of the JCPD’s investigation and decision.

The record demonstrates that Plaintiff failed to exhaust her administrative remedies prior to filing suit and thus is barred from pursuing her current claims. Plaintiff’s Complaint in Lieu of Prerogative Writ is entirely premature at this juncture as it is subject to disciplinary action and there has been no determination as to whether the City will award Plaintiff back-pay or defense costs pursuant to *N.J.S.A.* 40A:14-149.2 and *N.J.S.A.* 40A:14-155.

Therefore, there is no credible dispute that Plaintiff failed to exhaust her administrative remedies. Such failure operates as a bar to her ability to attempt to now litigate these issues in the Superior Court. Accordingly, Counts I and II of the Complaint in Lieu of Prerogative Writ must be dismissed.

CONCLUSION

Plaintiff's claims against the Defendants are deficient as a matter of law and warrant dismissal. Accordingly, Defendants respectfully submit that for the foregoing reasons Plaintiff's claims against the Defendants be dismissed.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'B. Levine', with a long horizontal line extending to the right.

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Brittany L. Primavera

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Michael O'Neill,

Petitioner

v.

JERSEY CITY

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SUPERIOR COURT OF NEW
JERSEY LAW DIVISION: HUDSON
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Docket No. HUD-L-4693-18

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PRELIMINARY STATEMENT

Plaintiff, Michael O'Neill's ("Plaintiff" or "O'Neill"), Second Amended Complaint in Lieu of Prerogative Writ must be dismissed as he has failed to exhaust his administrative remedies under *Rule* 4:69-5 and therefore this matter is not ripe for adjudication in the Superior Court.

O'Neill is a police officer with the City of Jersey City Police Department ("JCPD"). On June 14, 2016, Lieutenant Chesler ("Chesler") and Officers O'Neill, Joseph Ascolese and Michael Maietti of the JCPD were collectively indicted on one hundred seven (107) counts of conspiracy, falsifying records and official misconduct. O'Neill was charged with accepting payment for "no show" jobs associated with construction on the Pulaski Skyway Project. Following a trial and directed verdict for a judgment of acquittal as to the charges against O'Neill, the matter was referred back to the JCPD's Internal Affairs Unit ("Internal Affairs") for administrative review and action.

On October 19, 2018, counsel for O'Neill served the City of Jersey City ("City") with a demand for reinstatement, full back pay and benefits and counsel fees associated with his defense of the criminal matter. On October 24, 2018, the JCPD reinstated O'Neill. On October 31, 2018, Scott W. Carbone, Assistant Corporation Counsel for the City, responded to O'Neill's counsel that the City was reviewing O'Neill's claims under both *N.J.S.A.* 40A:14-149.2 (back pay and benefits during suspension period) and *N.J.S.A.* 40A:14-155 (counsel fees and costs associated with the criminal trial) and requested O'Neill's mitigation documents for the time period of his suspension. On November 2, 2018, counsel for O'Neill responded with the mitigation documents, but failed to provide the sum of defense costs sought. On November 26, 2018, Plaintiff filed his Complaint in Lieu of Prerogative Writ. On January 11, 2019, Plaintiff filed his Amended Complaint in Lieu of Prerogative Writ. On January 24, 2019, Plaintiff filed his Second Amended Complaint in Lieu of

Prerogative Writ.

Currently, this matter remains under investigation by the City as it evaluates and supplements its record of accusations against O'Neill and alleged misconduct following the conclusion of the criminal matter. To this end, the interview of a key witness has taken place on January 16, 2019. Chesler and O'Neill are the remaining two (2) individuals left to be interviewed. O'Neill's interview was scheduled for February 1, 2019¹ and Chesler's is scheduled for February 6, 2019. As indicated in the affidavit of investigating officer Robert Sjosward, there has been no unreasonable delay in the JCPD's Internal Affairs Unit's investigation of this matter since it was referred by the Hudson County Prosecutor's Office for administrative review and action. Thus, Plaintiff has brought this action prematurely and accordingly, it must be dismissed. Prerogative writs are appropriate for parties seeking review, hearing and relief by the Superior Court when a municipal agency has acted. Because the City has not made a final determination regarding an award of back pay or counsel fees, there is nothing for this court to review.

Once investigation of the matter is complete, should Plaintiff disagree with the City's determination, the Civil Service Commission ("Commission") will have primary jurisdiction of this matter and become Plaintiff's proper avenue to seek recourse. On his appeal before the Commission, Plaintiff will have an opportunity to assert any statutory or regulatory violations as defenses against the City. Only after a final determination by the Commission can Plaintiff bring allegations against the City by way of a complaint in lieu of prerogative writ absent an exception to the rule. Thus, the instant complaint is premature.

As discussed in further detail below, it is the clear intent of the Legislature to vest jurisdiction over civil service issues administratively with the Commission, and absent a

¹ Pursuant to the court's January 31, 2019 Order, O'Neill's interview has been postponed pending the outcome of the March 1, 2019 Order to Show Cause.

compelling excuse as to why Plaintiff's exercise of his administrative remedies would be futile, Plaintiff must pursue relief as established by court rule and as a matter of public policy. The Office of Administrative Law ("OAL") is in the best position to decide matters of this nature. The preservation of the integrity of the Legislature's intent mandates that O'Neill's complaint be dismissed. In sum, Plaintiff has utterly failed to plead what administrative action he seeks relief from as there has been no administrative action taken in this matter. For the reasons set forth herein, the instant action cannot be maintained as there exists an available right of review before an administrative agency which has not been exhausted.

STATEMENT OF FACTS²

Plaintiff is a police officer with the JCPD. (*See*, Second Amended Complaint in Lieu of Prerogative Writ ("Complaint") at ¶ 4, Exhibit ("Exh.") A to the Certification of Benjamin A. Levine ("Levine Cert.")).

On June 14, 2016, Plaintiff was indicted by a grand jury for allegedly accepting payment for "no show" jobs on a special New Jersey Department of Transportation Detail. (*See*, Exh. A at ¶¶ 5 and 6).

Following a trial, the Honorable Mirtha Ospina, J.S.C. granted O'Neill's motion for acquittal on October 12, 2018. (*See, Id.* at ¶ 7). A written order was issued by Judge Ospina on October 17, 2018. (*See, Id.* at 9). A Judgement of Acquittal was entered on October 26, 2018. (*See, Id.* at ¶ 11).

On October 19, 2018, Plaintiff sent a demand to the City Clerk requesting reinstatement, full back pay and benefits and attorneys' fees related to the defense of Plaintiff in the criminal matter. (*See*, Exh. B to Levine Cert.).

² On January 24, 2018, Plaintiff filed an Order to Show Cause with temporary restraints against Defendant seeking to bar Defendant from proceeding with any disciplinary action against O'Neill relating to the criminal charges. The court set a return date of March 1, 2019 for the Order to Show Cause. Should the court grant the instant Motion to Dismiss, Plaintiff's Order to Show Cause will be rendered moot.

On October 24, 2018, O'Neill was reinstated to his position with pay. (*See*, Exh. A at ¶ 12).

On October 26, 2018, the Office of the Hudson County Prosecutor referred the matter back to the Internal Affairs Unit of the JCPD for administrative review and action. (*See*, Exh. C to Levine Cert.).

As of the filing date of the instant motion, the matter remains under administrative review and therefore a decision has not yet been made as to Plaintiff's back pay and counsel fee claims. (*See*, Exh. D to Levine Cert.).

On October 31, 2018, the City responded to Plaintiff's demand letter requesting mitigation information for the calculation of back pay damages and any other information or materials that Plaintiff's counsel wanted the City to review regarding this claim under *N.J.S.A.* 40A:14-149.2. (*See*, Exh. E to Levine Cert.). The City also requested, "time to complete [their] review of the issues presented" with regard to Plaintiff's claim for attorneys' fees under *N.J.S.A.* 40A:14-155. *Id.*

On November 2, 2018, Plaintiff's counsel provided the City with the requested information pertaining to back pay damages. (*See*, Exh. F to Complaint).

On November 26, 2018, Plaintiff filed a Complaint in Lieu of Prerogative Writ with the Superior Court of New Jersey, Law Division, Hudson County, Docket No. HUD-L-4693-18 seeking reinstatement, back pay and attorneys' fees for the defense of Plaintiff in the criminal matter pursuant to *N.J.S.A.* 40A:14-155 and *N.J.S.A.* 40A:14-149.2. (*See*, Exh. I). On January 11, 2019, Plaintiff filed his First Amended Complaint in Lieu of Prerogative Writ. On January 24, 2019, Plaintiff filed his Second Amended Complaint in Lieu of Prerogative Writ. (*See*, Exh., A.).

LEGAL ARGUMENT

I. STANDARD FOR DISMISSAL PURSUANT TO R. 4:6-2

A motion to dismiss for failure to state a claim pursuant to Rule 4:6-2 (e) is based upon the allegations in the pleadings. *See, Rieder v. State Dep't of Transp.*, 221 *N.J. Super.* 547 (App. Div.

1987). In reviewing a motion to dismiss under this section, the court examines whether the pleading has sufficiently set forth a legal cause of action. *See, Printing Mart-Morristown v. Sharp Elec. Corp.*, 116 N.J. 739, 746 (1989). If the pleading states no basis for relief, and discovery would not provide one, dismissal of the pleading is appropriate. *See, Energy Rec. v. Dep't of Env. Prot.*, 320 N.J. Super. 59, 64 (App. Div. 1999), *aff'd*, 170 N.J. 246 (2001) (dismissing claims finding that there was no legal basis entitling relief). *See also, Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 105–06 (App. Div.), *certif. denied*, 185 N.J. 297 (2005) (granting motion to dismiss as defendants did not have a valid cause of action).

In resolving the motion to dismiss under *Rule* 4:6-2 (e), the Court will consider the allegations pleaded in the Complaint. *See, R. 4:6-2*. However, a motion to dismiss under *Rule* 4:6-2 (e) will not be converted to one for summary judgment by filing with the Court a document referred to in the pleading. *See, NJ Sports v. Bostick Promotions*, 405 N.J. Super. 173, 178 (Ch. Div. 2007). “A document integral to or explicitly relied upon in the [pleading] may be considered without converting the motion [to dismiss] into one for summary judgment.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1140, 1426 (3d Cir. 1997)); *See also, Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 183 (2005) (noting that when “evaluating motions to dismiss, courts consider ‘allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of the claim’” (internal citation omitted)); *See also, New Jersey Citizen Action, Inc. v. County of Bergen*, 391 N.J. Super. 596, 605 (App. Div. 2007) (holding that the consideration of certain documents referred to in the complaint did not convert defendants’ *R. 4:6-2(e)* motion into a motion for summary judgment).

Here, the Court should properly consider the documents reflecting the procedural history of this matter attached to the Certification of Benjamin A. Levine as these documents are a matter

of public record and involve other documents which are not subject to reasonable dispute. Applying this standard, each of Plaintiff's claims fail as a matter of law. Plaintiff has not, and cannot, allege facts to sustain the pleaded causes of action against the Defendant.

II. PLAINTIFF'S CLAIMS ARE BARRED BECAUSE HE HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES

Plaintiff's Second Amended Complaint in Lieu of Prerogative Writ must be dismissed as it is not ripe for adjudication by this court under R. 4:69-5. Pursuant to R. 4:69-5, all administrative remedies must be exhausted prior to adjudication of an action in lieu of prerogative writs. *Theodore v. Dover Bd. of Educ.*, 183 N.J. Super. 407, 412 (App. Div. 1982). R. 4:69-5 provides:

Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right to review before an administrative agency which has not been exhausted.

It is well established that the doctrine of exhaustion of administrative remedies serves three (3) fundamental goals: "(1) the rule ensures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate the need for unnecessary adjudication." *Borough of Seaside Park v. Comm'r of N.J. Dep't of Educ.*, 432 N.J. Super. 167, 203 (Super. Ct. App. Div. 2013); *See also, Bd. of Educ. v. Bernards Twp. Educ. Asso.*, 79 N.J. 311, 317 (1979). The principle of administrative review requires pursuit of available procedures, "to their appropriate conclusion and, correlatively, awaiting their final outcome before seeking judicial intervention." *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 767 (1947).

Absent a compelling exception to the rule, all administrative remedies must be exhausted prior to adjudication in superior court. "Exceptions are made when the administrative remedies would be futile, when irreparable harm would result, when jurisdiction of the agency is doubtful,

or when an overriding public interest calls for a prompt judicial decision.” *N.J. Civil Serv. Ass'n v. State*, 88 *N.J.* 605, 613, 443 A.2d 1070 (1982). In determining whether a “manifest injustice” would occur in requiring a plaintiff pursue his rights administratively and bypass the remedies set forth by the Legislature, courts have considered the, “relative delay and expense, the necessity for taking evidence and making factual determinations thereon, the nature of the agency and the extent of judgment, discretion, and expertise involved.” *Roadway Express v. Kingsley*, 37 *N.J.* 136, 141, 179 A.2d 729 (1962).

O'Neill is a police officer for the JCPD and a public service employee. The City is a civil service municipality subject to the *Civil Service Act*, *N.J.S.A.* 11A:1-1 to 12-6 and O'Neill is a classified civil service employee. To this end, the Attorney General's Office promulgated Internal Affairs Policy & Procedures to assist law enforcement agencies conducting internal affairs investigations under the general supervision of the Attorney General. (*See*, Exh. H to Levine Cert.). As such, the proper administrative procedure involves the issuance of a determination of Plaintiff's claims by the JCPD and, should Plaintiff disagree with the determination, following an opportunity for a full and fair hearing, the Commission would have jurisdiction over this matter as the dispute involves civil service issues. *See*, *N.J.S.A.* 11A:2-6(a) (the commission shall, “after a hearing, render the final administrative decision on appeals concerning permanent career service employees.”).

It is well established that it is within the Commission's jurisdiction to hear appeals of disciplined civil service employees setting forth claims for back pay and counsel fees. The plaintiff in *Telesnick v. Newark*, 63 *N.J.* 221, 223-224 (1973), was a city employee who brought a civil action in the Law Division for back pay following the dismissal of his indictment of a criminal charge. The city argued that the institution of a civil case was improper because plaintiff's claims

were subject to the civil service law and administrative review for mitigation or denial of the claim for back pay. The Supreme Court agreed with the city and remanded the matter to the proper municipal department for an administrative hearing. *See also, Mastrobattista v. Essex Cty. Park Comm'n*, 46 N.J. 138, 150 (1965) (holding that back pay claims should be pursued administratively as opposed to through an institution of a civil action in the law division. Additionally, holding that an administrative agency has the power to mitigate and deny back pay when necessary).

Numerous other courts have dismissed matters wherein a litigant attempted to sidestep the statutory administrative requirements promulgated by the Legislature and file a complaint in lieu of prerogative writ without first exhausting administrative remedies. *See, e.g., Roadway*, 37 U.S. at 142 (affirming dismissal of an action brought by a complaint in lieu of prerogative writs to contest a tax lien on the grounds of plaintiff's failure to exhaust administrative remedies); *See also, Smith v. City of Bridgeton*, No. A-1453-16T3, 2018 LEXIS 2607 (N.J. Super. Nov. 28, 2018) (affirming dismissal of police officer-plaintiff's complaint seeking reinstatement, back pay and reimbursement of legal expenses incurred in defending the criminal charge following his acquittal for failure to exhaust administrative remedies). Moreover, in *Fletcher v. City of Newark*, 155, N.J. 5, 10, 382 A.2d 79 (App. Div. 1978), the Appellate Division vacated the lower court's decision and remanded to the administrative agency citing lack of jurisdiction in a case involving a plaintiff-police officer seeking back pay following his reinstatement. The court held, "administrative review of the decision may then be taken in accordance with established procedure. Issues which then remain a matter of dispute may be appealed to us as of right." *Id.*

Here, the analysis stops short of the necessity of evaluating the Commission's jurisdiction and primary responsibility to render fair and final decisions on the claims of back pay and reimbursement of counsel fees because the JCPD has not even completed its initial investigation,

held a hearing or rendered a decision. Following the acquittal of the criminal charges against O'Neill and referral of the matter to the JCPD, Internal Affairs initiated an administrative investigation into O'Neill's alleged misconduct and claims. (*See*, Exh. D to the Levine Cert. at ¶¶ 7, 8 and 12). Interviews were promptly scheduled and continue as of the date of the filing of the instant motion. (*See, Id.* at ¶ 9-11.). Moreover, Investigating Lieutenant Sjosward and Captain George Rotondo anticipate a final report within the next 45 days. (*See, Id.* at ¶ 13.) As disciplinary charges may result from these investigations, no decision on back pay and counsel fees has been made.

Although O'Neill was acquitted of criminal charges, administrative actions are civil in nature and do not carry the same constitutional burdens as those imposed in criminal matters. *See, Sabia v. Elizabeth*, 132 N.J. Super. 6, 12, 331 A.2d 620 (App. Div. 1974) (holding, "[W]here the conduct of a public employee which forms the basis of disciplinary proceedings may also constitute a violation of the criminal law, however, the absence of a conviction, whether by reason of nonprosecution or even acquittal, bars neither prosecution nor finding of guilt for misconduct in office in the disciplinary proceedings."). Rather, in its investigation and determination, the JCPD must ensure that all proceedings are conducted with fundamental fairness and that procedural safeguards are maintained. *Id.* at 8; *see also, Kelly v. Sterr*, 62 N.J. 105, 107 (1973) (holding, "as long as principles of basic fairness are observed and adequate procedural protections afforded, the requirements of administrative due process have been met."). Following completion of the JCPD's investigation, it is possible that disciplinary charges may be issued against O'Neill either for violation of internal rules and procedures or misconduct under N.J.A.C. 4A. Thus, a decision on the pending claims before this court cannot be made at this juncture.

Notably, there exists no irreparable harm or prejudice to Plaintiff as he has been reinstated

into his former position since October, and is therefore not accruing any additional alleged damages pending the outcome of the JCPD's investigation and decision.

The record demonstrates that Plaintiff failed to exhaust his administrative remedies prior to filing suit and thus is barred from pursuing his current claims. Plaintiff's Second Amended Complaint in Lieu of Prerogative Writ is entirely premature at this juncture as it is subject to disciplinary action and there has been no determination as to whether the City will award Plaintiff back-pay or defense costs pursuant to *N.J.S.A. 40A:14-149.2* and *N.J.S.A. 40A:14-155*. In fact, counsel for O'Neill concedes the matter is premature in his November 27, 2018 cover letter to the City enclosing a copy of the filed original Complaint in Lieu of Prerogative Writ. (*See*, Exh. I to Levine Cert.). Therein, counsel for O'Neill states, "Although the City has not denied our request, *in an abundance of caution* [emphasis added] I filed a Superior Court action seeking attorney fees and back pay." *Id.*

Therefore, there is no credible dispute that Plaintiff failed to exhaust his administrative remedies. Such failure operates as a bar to his ability to attempt to now litigate these issues in the Superior Court. Accordingly, Counts I and II of the Second Amended Complaint in Lieu of Prerogative Writ must be dismissed.

CONCLUSION

Plaintiff's claims against the Defendant are deficient as a matter of law and warrant dismissal. Accordingly, Defendant respectfully submit that for the foregoing reasons Plaintiff's claims against the Defendant be dismissed.

Dated: New York, New York
February 4, 2019

Respectfully submitted,

GORDON, REES, SCULLY
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By: /s/ Benjamin A. Levine

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